

Memorandum 99-84

Estate Planning During Dissolution of Marriage (Draft Tentative Recommendation)

Family Code Section 2040 provides for an automatic temporary restraining order (ATRO) on service of the summons in a proceeding for dissolution or annulment of marriage, or legal separation. It isn't clear whether the ATRO's restraint on disposition of property applies to estate planning changes that only affect the disposition of property on death.

At its October 14, 1999, meeting the Commission instructed the staff to prepare a draft tentative recommendation clarifying the scope of the ATRO consistent with the following principles:

- (1) The ATRO should not restrain the creation, modification, or revocation of a will.
- (2) The ATRO should not restrain the revocation of a nonprobate transfer (other than life insurance).
- (3) The ATRO should restrain the creation or modification of a nonprobate transfer.
- (4) "Nonprobate transfer" should be limited to a list of the most common forms of revocable nonprobate transfer. The proper scope of this list is discussed below.

A draft tentative recommendation is attached for the Commission's review. If approved it will be circulated for public comment.

Scope of "Nonprobate Transfer"

The Commission decided that the proposed law should not use the open-ended and potentially confusing term "nonprobate transfer." Instead, the proposed law should expressly identify the types of transfers that would be covered. These would include a revocable trust, joint tenancy, Totten trust, or pay-on-death account in a financial institution. That is the approach taken in the attached draft tentative recommendation.

However, it may be appropriate to expand the list of nonprobate transfers covered by the proposed law to include the following:

- Retirement plan death benefits
- Transfer on death (TOD) registration of securities
- TOD registration of vehicles, vessels, and mobile homes

If we do not include these forms of nonprobate transfer, we may create the implication that the ATRO does not apply to them, in which case a spouse would be free to change the beneficiary in such an instrument during a dissolution proceeding. This would be contrary to the Commission's tentative conclusion that modification of a nonprobate transfer should be automatically restrained.

Respectfully submitted,

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ESTATE PLANNING DURING MARITAL DISSOLUTION

1 Existing law imposes an automatic temporary restraining order (ATRO) on
2 service of the summons in a proceeding for dissolution or annulment of marriage,
3 or legal separation (hereinafter “dissolution”). Except as necessary to pay
4 attorney’s fees or ordinary expenses, the ATRO restrains the parties from
5 “transferring, encumbering, hypothecating, concealing, or in any way disposing of
6 any property, real or personal, whether community, quasi-community, or separate,
7 without the written consent of the other party or an order of the court.”¹

8 It is not clear whether the restraint on “in any way disposing” of property applies
9 to estate planning changes that only affect the disposition of property on death
10 (e.g., revocation of a will or severance of joint tenancy). The Commission has
11 been informed that different trial courts interpret the ATRO differently — some
12 interpret the ATRO as restraining estate planning changes while others do not.²
13 There appears to be no California case law on the issue.³

PROBLEMS WITH EXISTING LAW

14 **Uncertainty**

15
16 Uncertainty as to whether the ATRO restrains estate planning changes can create
17 a trap for unwary parties and inexperienced practitioners. For example, if a party
18 makes an estate planning change during a dissolution proceeding without first
19 obtaining spousal consent or the permission of the court, and the court interprets
20 the ATRO as restraining such a change, the change may be ineffective and the
21 party may be held in contempt.⁴

1. See Fam. Code § 2040(a)(2).

2. This uncertainty is reflected in a standard family practice treatise and in a recent publication of the California State Bar Family Law Section. See W. Hogoboom & D. King, *California Practice Guide: Family Law* ¶ 1:394.1 (1999) (cautioning that severance of a joint tenancy “may well” violate the ATRO); Moore, *Selected Estate Planning Issues for Family Lawyers*, Family Law News, California State Bar Family Law Section, Winter 1996, at 12-13 (discussing uncertainty as to whether ATRO applies to severance of joint tenancy and revocation of trust).

3. Courts in other states have interpreted similar provisions restraining the disposal of property during a marital dissolution proceeding, with varying results. See, e.g., *Lindsey v. Lindsey*, 492 A.2d 396 (Pa. Super. 1985) (change of beneficiary designation on life insurance policies not conveyance of asset because beneficiary designation vests nothing in beneficiary during lifetime of insured — beneficiary has mere expectancy); *Lonergan v. Strom*, 700 P.2d 893 (Ariz. 1985) (severance of joint tenancy by means of straw transfer clearly violated ATRO, but did not violate purpose of ATRO — to protect marital estate from dissipation or removal beyond reach of divorce court); *Willoughby v. Willoughby* 758 F. Supp. 646 (DC Kan. 1990) (change of life insurance beneficiary was disposition of property in violation of restraining order). See generally Chapus, *Divorce and Separation: Effect of Court Order Prohibiting Sale or Transfer of Property on Party’s Right to Change Beneficiary of Insurance Policy*, 68 A.L.R.4th 929 (Westlaw 1999).

4. See Civ. Code § 2224 (“One who gains a thing by ... wrongful act, is ... an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.”); Code Civ. Proc. § 1209(a)(5) (contempt includes disobedience of lawful court order).

1 **Unintended Transfers**

2 A change in a person's life as significant as dissolution of marriage will often
3 lead to changes in that person's testamentary intentions. If the ATRO prevents a
4 person from making an intended estate planning change and the person dies during
5 the dissolution proceeding, the person's estate will pass in an unintended way. For
6 example, suppose a husband and wife convey their community property into a
7 trust that names the survivor of them as beneficiary and is unilaterally revocable
8 by either. The wife later files for dissolution of marriage and decides to revoke the
9 trust and execute a will devising her share of the community property to her
10 children. Before she can obtain a court order permitting the estate planning
11 changes, she dies, and contrary to her wishes, her husband receives the entire
12 property.

13 **Disproportionate Effect on Respondent Spouse**

14 The ATRO takes effect on service of the summons in a proceeding for
15 dissolution of marriage.⁵ This means that a petitioner can effectively avoid the
16 ATRO by making any desired estate planning changes before filing. A respondent
17 who is unaware of a pending summons cannot avoid the ATRO in this way. This
18 means that the problems associated with the ATRO provision, discussed above,
19 disproportionately affect respondents.

20 **Inefficiency**

21 It appears that a principal purpose of the ATRO provision is to conserve judicial
22 resources by making automatic those types of restraints that are commonly sought
23 and granted in dissolution proceedings.⁶ However, if parties to a dissolution
24 routinely wish to make estate planning changes during the proceeding, then
25 judicial efficiency is not served by an automatic restraint of such changes. In fact,
26 estate planning changes during dissolution of marriage appear to be commonplace.
27 In one appellate decision, the court suggests that family law attorneys risk
28 malpractice liability if they do not advise their clients of the need to make estate
29 planning changes during a dissolution proceeding in order to avoid an unintended
30 transfer if the client dies during the proceeding.⁷ Similar advice is provided in

5. See Fam. Code § 233(a).

6. See, e.g., Assembly Committee on Judiciary analysis of Assembly Bill 1905, May 4, 1989, at 6:

Proponents state that the restraining orders contained in this proposal are granted routinely by courts following the filing of an Order to Show Cause (OSC). One of the elements presently contributing to court congestion in family law courts is the routine filing of such OSC's simply to obtain these standard orders, with the attendant court time necessary for perfunctory hearings or, as is usual, signing in chambers. One or both parties usually seek at least one of these restraining orders soon after filing the family law action.

This proposal would save court time without diminishing the parties' right to a hearing. Either party always would have the option of filing a motion to request that the orders be dissolved.

7. See Estate of Blair, 199 Cal. App. 3d 161, 169, 244 Cal. Rptr. 627, 631 (1988).

1 standard family law practice treatises.⁸ Considering that careful attorneys will seek
2 spousal consent or an order of the court before taking such actions, the court will
3 be required to hear numerous requests that would be granted in many cases — an
4 apparent waste of judicial resources.

5 PROPER SCOPE OF RESTRAINING ORDER

6 As a general matter, it is inequitable and inefficient to require that a party to a
7 dissolution proceeding obtain spousal consent or an order of the court before
8 making estate planning changes that do not affect the rights of the other spouse.
9 Such a restraint also exceeds the proper purpose of the ATRO — protecting
10 marital assets from dissipation or concealment. As stated in an Arizona case
11 interpreting a similar ATRO provision:

12 In our opinion, it is not the purpose of [the ATRO] to freeze each party's estate plan as of the
13 date of the filing of the petition for dissolution and thus insure that it will be effectuated without
14 alteration in the event one of the parties dies before entry of a final decree. The statutory intent is
15 to forbid actions by either party that would dissipate the property of the marital estate or place it
16 beyond the court's adjudicatory power in the dissolution proceeding.⁹

17 Whether different types of estate planning changes might adversely affect the
18 property interests of the other spouse is analyzed below.

19 **Transaction Involving a Will**

20 The beneficiary of a will has no vested property interest in the will during the
21 testator's life. Thus, a decision by one spouse to create, modify, or revoke a will
22 during a dissolution procedure does not affect the rights of the other spouse and
23 should not be automatically restrained.

24 Of course, spouses may agree by contract to make a particular testamentary
25 disposition by will. In such a case, the contract itself serves to restrain
26 modification or revocation of the agreed upon will provision.¹⁰ It is not necessary
27 that all estate planning changes involving wills be automatically restrained during
28 dissolution proceedings in order to protect these contractual agreements.

8. See W. Hogoboom & D. King, *California Practice Guide: Family Law* ¶¶ 1:367-369, -390 (suggesting that it is the duty of family law attorneys to promptly inquire whether their clients wish to sever joint tenancy in order to avoid unintended transfer if client dies during proceeding); K. Kirkland et al., *California Family Law Practice and Procedure* § 20.12[4][a][iv] (2d ed. 1999) (suggesting that clients should be advised to sever joint tenancy on commencing family law proceeding in order to avoid possible unintended transfer to other spouse). Although these examples focus on joint tenancy survivorship, the same concerns are raised by other instruments that transfer property on death.

9. *Lonergan v. Strom*, 700 P.2d 893, 898 (Ariz. 1985).

10. See, e.g., *Redke v. Silvertrust*, 6 Cal. 3d 94, 490 P.2d 805, 98 Cal. Rptr. 293 (1971) (enforcing oral agreement to maintain particular testamentary provision).

1 **Revocation of Nonprobate Transfer**

2 Many people choose to use a “nonprobate transfer” (such as a revocable trust,
3 joint tenancy title, or a pay-on-death (“P.O.D.”) account in a financial institution),
4 in order to pass property on death outside of the probate process. Revocation of a
5 revocable nonprobate transfer is similar to revocation of a will in that it terminates
6 a mere expectancy and does not affect a vested property right.¹¹ There does not
7 appear to be any reason to automatically restrain the revocation of a nonprobate
8 transfer during a dissolution proceeding.¹²

9 **Modification of a Nonprobate Transfer**

10 Modification of a nonprobate transfer during a dissolution proceeding can result
11 in an unauthorized transfer of community property. This is because a nonprobate
12 transfer, unlike a will,¹³ can be used to dispose of both spouses’ share of
13 community property, so long as both spouses have consented to the transfer.¹⁴

14 If, during a dissolution proceeding one party modifies a nonprobate transfer of
15 community property on the party’s death, without the consent of the party’s
16 spouse, the nonconsenting spouse’s share of the property may be transferred
17 contrary to the nonconsenting spouse’s wishes. For example, suppose that a
18 husband, with his wife’s consent, conveys community funds into a P.O.D. account,
19 naming their children as beneficiaries. Later, during a proceeding to dissolve their
20 marriage, the husband changes the account to name his brother as beneficiary,
21 without his wife’s consent. The husband then dies and his brother withdraws all of
22 the funds, including the wife’s share of the community property.¹⁵ This is exactly
23 the sort of dissipation of marital assets that the ATRO is intended to prevent. It is
24 therefore appropriate to automatically restrain modification of a nonprobate
25 transfer of community property.¹⁶

26 Modification of a nonprobate transfer of separate property does not present the
27 same risk of unauthorized transfer of community property. However,
28 characterization of property as community or separate often involves a complex
29 legal and factual determination that is probably best left to the courts. For this

11. See, e.g., *In re Marriage of Hilke*, 4 Cal. 4th 215, 222, 841 P.2d 891, 895, 14 Cal. Rptr. 2d 371, 375 (1992) (“severance of a joint tenancy — by eliminating the survivorship characteristic of the joint tenancy form of ownership — theoretically affects the expectancy interest of the other joint tenant, but does not involve a diminution of his or her present vested interest”).

12. Life insurance presents a special case and is discussed separately *infra*.

13. See Prob. Code § 6101 (will may only dispose of testator’s half of community property).

14. Prob. Code § 5020 (spousal consent required for nonprobate transfer of community property).

15. See Prob. Code §§ 5403 (P.O.D. account paid to P.O.D. payee on proof of death of original payee), 5405 (payment pursuant to Section 5403 discharges financial institution of all claims regardless of whether payment was consistent with beneficial ownership of the account).

16. Note that a rule permitting revocation of a nonprobate transfer but requiring spousal consent or a court order in order to modify a nonprobate transfer is consistent with the rule governing a trust containing community property — either spouse can unilaterally revoke such a trust, but the consent of both spouses is required in order to modify it. See Fam. Code § 761.

1 reason, it is appropriate to automatically restrain modification of a nonprobate
2 transfer of separate property during a dissolution proceeding — in order to avoid a
3 situation where a party acts on an erroneous characterization of community
4 property as separate. This would be consistent with the general rule restraining
5 both parties from disposing of separate or community property without the consent
6 of the other spouse or authorization of the court.¹⁷

7 **Creation of a Nonprobate Transfer**

8 Creation of a nonprobate transfer can also pose a risk of unauthorized transfer of
9 community property. For example, one spouse may use community funds to
10 establish a P.O.D. account, without the consent of the other spouse, naming a third
11 party as P.O.D. payee. On the account holder's death, the funds, including the
12 nonconsenting spouse's share, would be paid to the third party. Thus, for the same
13 reasons that modification of a nonprobate transfer should be restrained, creation of
14 a nonprobate transfer should also be restrained.

15 **Life Insurance**

16 The ATRO expressly restrains cancellation or modification of any type of
17 insurance during a dissolution proceeding.¹⁸ This preserves the status quo in
18 important ways — such as preventing the cancellation of health insurance
19 coverage of a spouse. It also helps avoid the problem of an unauthorized transfer
20 of community property to a third party, discussed *supra*. Finally, it preserves an
21 asset that the court can use in fashioning a support order (it is fairly common for
22 one spouse to be ordered to maintain life insurance for the benefit of the supported
23 spouse).¹⁹ For all of these reasons, the existing restraint on cancellation or
24 modification of insurance policies should be maintained.

25 **RECOMMENDATION**

26 The proposed law would amend Family Code Section 2040 to clarify the scope
27 of the ATRO consistent with the following principles:

- 28 (1) The ATRO should not restrain the creation, modification, or revocation
29 of a will.
- 30 (2) The ATRO should not restrain the revocation of a nonprobate transfer
31 (other than life insurance).²⁰

17. See Fam. Code § 2040(a)(2).

18. See Fam. Code § 2040(a)(3).

19. See Fam. Code § 4360 (support order may include amount sufficient to maintain insurance on life of support obligor, for benefit of supported spouse).

20. "Nonprobate transfer" means a revocable trust, joint tenancy, Totten trust, or pay-on-death account in a financial institution. See proposed Fam. Code §§ 2040(a)(4), 2045(c) *infra*.

1 (3) The ATRO should restrain the creation or modification of a nonprobate
2 transfer.

3 In addition, Family Code Section 2045 should be amended to make clear that a
4 court may make an order, on the motion of one of the parties, restraining estate
5 planning changes that are not subject to the ATRO.

PROPOSED LEGISLATION

1 **Fam. Code § 2040 (amended). Automatic temporary restraining order**

2 SECTION 1. Section 2040 of the Family Code is amended to read:

3 2040. (a) In addition to the contents required by Section 412.20 of the Code of
4 Civil Procedure, the summons shall contain a temporary restraining order:

5 (1) Restraining both parties from removing the minor child or children of the
6 parties, if any, from the state without the prior written consent of the other party or
7 an order of the court.

8 (2) Restraining both parties from transferring, encumbering, hypothecating,
9 concealing, or in any way disposing of any property, real or personal, whether
10 community, quasi-community, or separate, without the written consent of the other
11 party or an order of the court, except in the usual course of business or for the
12 necessities of life and requiring each party to notify the other party of any
13 proposed extraordinary expenditures at least five business days before incurring
14 those expenditures and to account to the court for all extraordinary expenditures
15 made after service of the summons on that party.

16 Notwithstanding the foregoing, nothing in the restraining order shall preclude a
17 party from using community property, quasi-community property, or the party's
18 own separate property to pay reasonable attorney's fees and costs in order to retain
19 legal counsel in the proceeding. A party who uses community property or quasi-
20 community property to pay his or her attorney's retainer for fees and costs under
21 this provision shall account to the community for the use of the property. A party
22 who uses other property that is subsequently determined to be the separate
23 property of the other party to pay his or her attorney's retainer for fees and costs
24 under this provision shall account to the other party for the use of the property.

25 (3) Restraining both parties from cashing, borrowing against, canceling,
26 transferring, disposing of, or changing the beneficiaries of any insurance or other
27 coverage, including life, health, automobile, and disability held for the benefit of
28 the parties and their child or children for whom support may be ordered.

29 (4) Restraining both parties from creating or modifying a provision for the
30 transfer of property on death in a revocable trust, Totten trust, or pay-on-death
31 account in a financial institution without the written consent of the other party or
32 an order of the court. Nothing in this section restrains revocation of such a
33 provision, severance of a joint tenancy, or the creation, modification, or revocation
34 of a will.

35 (b) In all actions filed on and after January 1, 1995, the summons shall contain
36 the following notice:

37 "WARNING: California law provides that, for purposes of division of property
38 upon dissolution of marriage or legal separation, property acquired by the parties
39 during marriage in joint form is presumed to be community property. If either

1 party to this action should die before the jointly held community property is
2 divided, the language of how title is held in the deed (i.e., joint tenancy, tenants in
3 common, or community property) will be controlling and not the community
4 property presumption. You should consult your attorney if you want the
5 community property presumption to be written into the recorded title to the
6 property.”

7 **Comment.** Paragraph (4) is added to Section 2040(a) to clarify the scope of the automatic
8 temporary restraining order (ATRO) with respect to estate planning changes. The fact that the
9 ATRO does not restrain revocation of a provision for the transfer of property on death in a
10 revocable trust, Totten trust, or pay-on-death account in a financial institution does not mean that
11 such a provision is necessarily subject to revocation by a party. The question of whether such a
12 provision is subject to revocation is governed by the terms of the instrument and applicable
13 substantive law.

14 Note that the court may issue an order restraining estate planning changes on the motion of a
15 party. See Section 2045(c).

16 **Fam. Code § 2045 (amended). Ex parte protective and restraining orders**

17 SEC. 2. Section 2045 of the Family Code is amended to read:

18 2045. During the pendency of the proceeding, on application of a party in the
19 manner provided by Part 4 (commencing with Section 240) of Division 2, the
20 court may issue ex parte any of the following orders:

21 (a) An order restraining any person from transferring, encumbering,
22 hypothecating, concealing, or in any way disposing of any property, real or
23 personal, whether community, quasi-community, or separate, except in the usual
24 course of business or for the necessities of life, and if the order is directed against
25 a party, requiring that party to notify the other party of any proposed extraordinary
26 expenditures and to account to the court for all extraordinary expenditures.

27 (b) A protective order, as defined in Section 6218, and any other order as
28 provided in Article 1 (commencing with Section 6320) of Chapter 2 of Part 4 of
29 Division 10.

30 (c) An order restraining a party from creating, modifying, or revoking a
31 provision for the transfer of property on death in a will, revocable trust, Totten
32 trust, or pay-on-death account in a financial institution, or from severing a joint
33 tenancy.

34 **Comment.** Section 2045 is amended to authorize issuance of a court order restraining certain
35 estate planning changes that may not be automatically restrained pursuant to Section 2040. See
36 Section 2040(a)(4).